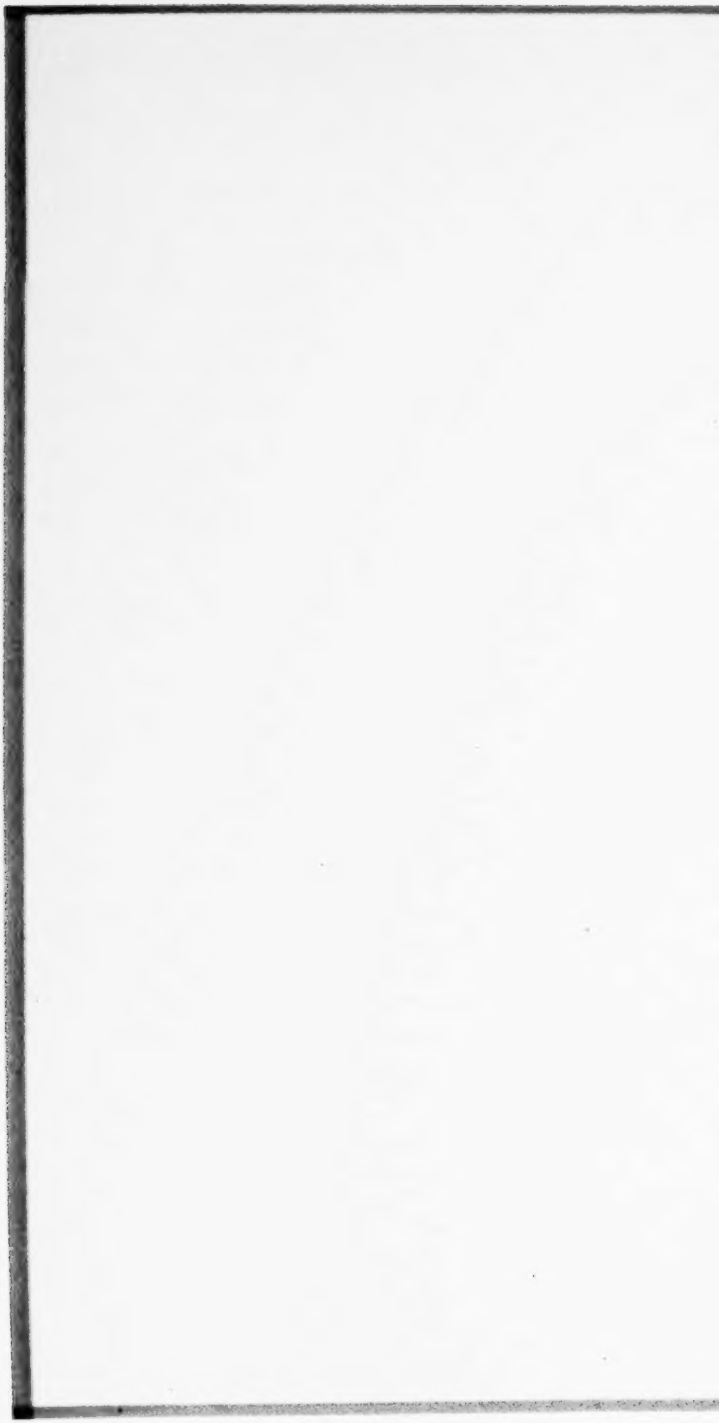

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IN THE

Supreme Court of the United States of America.

ADOLPHUS F. McCLAINE,
Plaintiff in Error,

vs.

GEORGE C. RANKIN, as Receiver of the First National Bank of South Bend, Washington,
Defendant in Error.

58.

No. 58, October Term, 1904.

In Error to the United States Circuit Court of Appeals for the Ninth District.

Brief of Plaintiff in Error.

T. O. ABBOTT,
Attorney for Plaintiff in Error.

ALLEN & LANSDEN PRINTING CO., OVER POSTOFFICE.

IN THE

Supreme Court of the United States of America.

ADOLPHUS F. McCLAINE,
Plaintiff in Error,

vs.

GEORGE C. RANKIN, as Receiver of the First National Bank of South Bend, Washington,
Defendant in Error.

No. 321 October Term, 1903.
No. 58, October Term, 1904.

This an action by a receiver of an insolvent national banking institution for the purpose of recovering upon an alleged assessment against a stockholder.

The records will disclose the following facts:

STATEMENT OF FACTS.

The First National Bank of South Bend became insolvent and closed its doors on the 10th day of August, 1895, and on the 17th day of the same month one Joseph G. Heim was appointed its receiver. Subsequently, one J. Frank Aldrich, was appointed as Mr. Heim's successor, Heim having resigned; (see Transcript, p. 1-2, Par. II.) and later on, (during the progress of this proceeding) Mr. Aldrich resigned, and Mr. George C. Rankin, the defendant in error, was appointed in his stead.

On the 17th day of August, 1896, the *Depuly and Acting* Comptroller of the Currency levied an assessment against the shareholders of the insolvent bank on account of their statutory liability. (See Transcript, p. 2, Par. III.)

The defendant in error was a stockholder. Shortly afterwards, Mr. Heim (the then receiver) began actions against some of the stockholders who had not paid in their respective assessments, of which the plaintiff in error was one. A short time after the assessment fell due the defendant in error (by his predecessor, Mr. Heim) began an action against the plaintiff in error by *serving* the summons and complaint, but withholding the same from the record. This fact is important to bear in mind in connection with a counter-claim which appears in the record. By the provisions of the statutes of Washington an action is *commenced* when the defendant has been *served*, and it is the practice to withhold the papers from the public records until some question arises in the progress of the litigation which makes it necessary to obtain an order of the court, whereupon the papers are filed and the proceeding becomes public. It often happens that actions thus begun are settled entirely out of court and no public record of the matter is ever made. Shortly after the action was thus begun plaintiff in error made a proposition of settlement as follows:

"Regarding the assessment of 100 per cent upon the stock "held by me in the First National Bank of South Bend, I have "the following proposition to submit as to the payment of the "amount, $2,500, and the overdraft account of J. W. Morgan: "I will sell and deed to you lots Nos. 3 and 4, block 27, Cor- "rected Plat of South Bend, in payment of the amount of the "overdraft above mentioned, to-wit, $215.83, and $200 addi- "tional to be credited upon my stock assessment, you to *dismiss* "*the suit* brought against myself and wife. And I make the "*following* proposition as to the payment of the balance: I will "pay on May 1st, 1897, $425, on August 1st, 1897, $625, on "November 1st, 1897, $625, and on February 1st, 1898, $625."

See Transcript, p. 41.

It will be observed that this letter contained two distinct propositions, namely:

1. A proposition to give a deed to certain lots, in consideration of a credit of $415.83, and the dismissal of the action.

2. A proposition to pay the *balance* of the assessment at *stated times.*

This view of the letter is *res adjudicata* having been already determined in a former action, the record of which is in this action.

In answer to this letter the receiver wrote as follows:

"Yours of the 16th is at hand. Herewith I enclose you "deeds for lots 4 & 5, block 27, Corrected Plat of South Bend, "Wash., for you and your wife to sign. Upon the return to me "of the deed properly executed, and the receipt of $425 by May "1st next I will send you a receipt for the Morgan overdraft and "give you credit for $625 upon your assessment, and will make a "recommendation to the comptroller that your proposition of "4-8-97 be accepted, and will instruct my attorneys to hold in "abeyance, or dismiss the suit.

"If the proposition is not accepted by the comptroller, *I "will return you the deed unrecorded*, also, the money,—$425. "Your proposition having been made good by the first payment "will undoubtedly have great weight with the comptroller in de- "termining him to accept the proposition."

See Transcript, p. 41.

From this it will be seen that the receiver *accepted* the proposition *conditionally*, stating that he would make a *recommendation* to the comptroller that it be accepted; and agreed that if the comptroller did not authorize its acceptance, "I will return you the deed unrecorded."

The failure of the receiver to carry out his part of this arrangement, is the foundation of a long period of litigation which has finally found its way to this tribunal.

Plaintiff in error forwarded the deed in accordance with his proposition, and afterwards made a payment on account of the balance, as shown by the following letters:

"Herein deed to lots 4 & 5, bl'k 27, Corrected Plat of South "Bend as per our arrangement verbal and my proposition of "Apr. 8, 1897. * * "

"Herein my check No. 7 for $200, on acc't of payment due "May 10th. * * "

See letters Apr. 29 and May 2, 1897, Transcript, p. 42.

But Mr. Heim failed to *dismiss the action,* and failed to get the approval of the comptroller.

Other propositions and counter-propositions passed between the parties, but nothing ever came of them. (See letter of Nov. 2, 1897, to Heim; Transcript, p. 46). Finally, without notice to plaintiff in error, Mr. Heim proceeded to *file* the papers in the action, and *took a judgment by default* against him; but he did not then, and never has since, *returned the deed unrecorded, nor the money paid him as an evidence of good faith.*

When he learned that a judgment had been taken against him, plaintiff in error made application to have it vacated and set aside, upon the ground that it was taken contrary to the understanding between him and Mr. Rankin; and his application was granted by the court after a hearing upon the merits.

See Transcript, pp. 12, 13.

Subsequently Mr. Heim, without notice to plaintiff in error, secured an order of the court *dismissing* the action "without prejudice."

This order plaintiff in error caused to be modified by having the words "without prejudice" *stricken out,* for the sole purpose of having the order serve as a bar to another action on the assessment; and this modification was *consented* to by the attorney for Mr. Heim.

See Par. V, Transcript, p. 14.

As will appear below, the plaintiff in error contends that the order of dismissal, thus modified, created a bar against the maintainance of any further action upon the *assessment;* and that the defendant in error was thereupon relegated to his remedy, if he had any, upon the alleged *contract of compromise.*

THE SECOND ACTION BY THE RECEIVER AGAINST THE PLAINTIFF IN ERROR.

Such was undoubtedly the view of the receiver himself, for he thereupon immediately instituted an action against plaintiff

in error for this purpose. The record in this action is before this court.

See defendant's Exhibit "B," Transcript, pp. 31 to 40.

The important allegations of the complaint in that action appear on p. 33 of the Transcript, and read as follows:

"9.

"That plaintiff subsequently to the 17th day of September, "1896, begun an action against said defendants on the said "claim, in the Superior Court of the State of Washington, for "Pierce County, being case No. 16,663 in said court, and that "subsequently to the bringing of said action the said defendant "A. F. McClaine, made a written proposition to said plaintiff to "settle said claim, upon the following terms, to-wit:

"That the said defendant would pay $200 thereon, and that "said action *be dismissed*, and he would *then* pay the balance as "follows:

"$425 .....May 1st, 1897.
"$625 .....August 1st, 1897.
"$625 .....November 1st, 1897.
"$625 .....February 1st, 1898.

"And said proposition was *duly accepted* by plaintiff.

"10.

"That the said defendant made the first payment of $200 "thereon, on or about the 20th day of April, 1897, and also a "further payment of $200 on or about the 21st day of May, "1897; but has wholly failed to make any other or further pay-"ments on said settlement."

Mr. McClaine admitted the making of a written proposition to the receiver, but alleged that it was never carried out by the receiver; and he set up a counter-claim for damages resulting to him on account of the failure to dismiss the former action, as agreed.

See Answer, Transcript, pp. 34-37.

The counter-claim consisted of the loss of the fair and rea-

sonable value of the premises, amounting to $1200, and also the necessary expenditure for attorney's fees in securing the vacation of the judgment wrongfully taken against him, $100; making a total of $1300. The important allegations are as follows:

"V.

"That said default and judgment was taken without any "notice to this defendant; that immediately upon learning that "said judgment had been entered as foresaid, this defendant did "apply for the vacation thereof, and for leave to appear and "defend against said action; and that plaintiff was duly served "with a notice of said application, and did appear before said "court and did resist said application, *upon the merits thereof;* "and said court on the 21st day of February, 1898, after hear- "ing the evidence produced by both parties *upon the merits* of "said application and the argument of counsel thereon, and be- "ing fully advised, *did find* that the entering of said judgment "*was contrary to agreement and in violation thereof*, and did "order said judgment vacated and set aside and declared of no "effect and void.

"VI.

"That the full and fair value of the remises hereinbefore "described, at the time of the agreement hereinbefore referred "to was the sum of twelve hundred dollars.

"VII.

"That on account of said wrongful taking and entering of "said judgment, this defendant was compelled to expend in at- "torney's fees the sum of one hundred dollars."

Upon the issues as thus made up, the action went to trial. The evidence having been taken and submitted to the court, the receiver moved for a non-suit, which was granted.

See Transcript, p. 40.

THE THIRD ACTION BY THE RECEIVER AGAINST THE DEFENDANT IN ERROR.

This ended all attempts by the receiver to recover on account of the alleged *agreement of compromise*. But he thereupon re-

turned to the *assessment*, and notwithstanding the terms of the dismissal of the previous action on the assessment, (which shows conclusively the understanding of the parties that it was to serve as a *bar* to further proceedings on the assessment, else why the striking out *by consent* of the words "without prejudice"?) he instituted the action now at this bar,—being the third and last of the series.

The plaintiff in error first met the action by a plea that it was not brought within the time limited by law. His contention was sustained by the Circuit Court, (see Trans., p. 5) but upon appeal the order was reversed. Upon remand, the issue raised by the demurrer that the complaint did not state facts sufficient to constitute a cause of action was urged. This being overruled, (see Trans., p. 8) the plaintiff in error (see Trans., pp. 8-18). He set up two affirmative defenses, to-wit:

First: That the action was barred by the order of dismissal in the first action.

Second: He renewed the counter claim which he had interposed in the second action, adding to the items of damage, the failure of the receiver to return him the $200 in cash which he paid him as an evidence of good faith on the proposition to compromise.

A demurrer to the counter claim was interposed by the receiver and sustained by the court, except as to the $200 just referred to.

See Transcript, p. 19.

The issues were tried and determined by the court. For the purpose of showing that the receiver was not entitled to maintain the action "for want of the authority of the Comptroller of the Currency and of a court of competent jurisdiction," the defendant offered a certified copy of an order made by the Circuit Court, describing the claim against him, as a "bad and doubtful" asset, and directing the receiver "to *compromise and compound, or sell*" the same at private sale, and that he had not obtained any revocation of this direction, nor any authority to bring this action.

See Transcript, pp. 48-49.

The court overruled all the contentions of the defendant and rendered judgment against him for the sum of $3,183.47. It allowed the $200 counter claim for *cash* paid, as a credit upon the amount, and offered to allow the defendant,

—"a further credit of $200 of date April 29, 1897, on account "of the transfer of lots 3 & 4, block 27, Corrected Plat of South "Bend, *if he would accept the same*, but as he declines to say "whether he will accept the same or not, the court concludes that "it has no right to allow said credit of its own motion and with-"out the assent of the defendant."

See Conclusion of Law, Transcript, p. 21.

ASSIGNMENTS OF ERROR.

The errors upon which the plaintiff relies are as follows:

I.

That the judgment of the Circuit Court sustaining the demurrer to the complaint upon the ground that the action was not commenced within the time limited by law, should have been affirmed.

II.

That the demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action should have been sustained.

III.

That the motion of the defendant to strike the defense of the plaintiff, whereby he set up a counter claim against the receiver on account of the wrongful taking of the judgment in the first action, and on account of the loss of the true and fair value of the premises conveyed to the receiver in trust, and on account of the expenditures for attorney's services made necessary by the action of the receiver in taking the judgment, should have been denied.

IV.

That the Circuit Court should have rejected Exhibit "B," offered by defendant in error, whereby it was sought to prove the levying of the assessment, and the demand against the defendant to pay the same.

V.

That the Circuit Court should have sustained the motion of plaintiff in error for a non-suit, at the close of the trial.

VI.

That the Circuit Court should have admitted identifications Nos. 1 and 2, which were offered by plaintiff in error for the purpose of showing that the defendant in error was without authority to maintain this action.

VII.

That the court should not have entered the findings of fact and conclusions of law proposed by the defendant in error.

VIII.

That the court should have entered a judgment in favor of the plaintiff in error instead of for the defendant.

ARGUMENT AND AUTHORITIES.

THE FIRST ASSIGNMENT OF ERROR.

THE STATUTE OF LIMITATIONS.

If the contention of the plaintiff in error that this action is barred by the statute of limitations, is correct, it will be unnecessary to consider the other errors alleged.

That this action is barred by the statute of limitations we think can be shown by the decisions of this court and the statutes and decisions of the State of Washington.

The statutes of Washington in question here are as follows.

"Actions can only be commenced within the periods herein "prescribed after the cause of action shall have accrued."

See Ballinger's Code of Washington, Sec. 4796.

"Within three years: * * 3. An action upon a contract "or liability, express or implied, which is not in writing, and "does not arise out of any written instrument." * *

See Ballinger's Code of Washington, Sec. 4800.

"An action for relief *not hereinbefore provided for* shall be "commenced within two years after the cause of action shall have "accrued."

See Ballinger's Code of Washington, Sec. 4805.

This action was begun within *three* years, but not within *two* years. Hence these statutes present only one question for the consideration of this court, which is, is the additional liability of a stockholder in a national banking association a *contractual* or *statutory* liability *within the meaning of the statute of limitations?*

It will not be contended here that, *for some purposes*, this liability is contractual. This view has been so often taken by the courts of this country, and by this court particularly, that it would be a waste of time to contend here to the contrary. It will be found, however, upon an examination of these authorities that it has never been held, where the question has been directly presented, that the liability was in the nature of a contract *when considered with reference to the statute of limitations.* On the contrary it has been held, in many courts, that for the purpose of the statute of limitations, the liability must be considered as *statutory;* that is to say, it being a liability "created by statute," actions to enforce it must be brought within the period specified for the bringing of actions to enforce statutory liabilities.

In Washington there is no statute relating in express language to a liability created by statute, "except for a forfeiture or penalty."

An action to enforce such a liability therefore comes within the provision of section 4805, above quoted, because it is an action upon a liability for which no relief is "hereinbefore provided for." That this view of the statute is well founded has been held by the Supreme Court of the State of Washington in the following cases:

Spokane vs. Stevens, 12 Wash., 667.
Ballard vs. West Coast Co., 15 Wash., 572.
State vs. Ballard, 16 Wash., 418.
Seattle vs. De Wolfe, 17 Wash., 349.

These cases relate to the enforcement of liens, against real property, *created by statute* for public improvements made by municipalities. It is squarely decided, and constantly affirmed, that actions of this character are to be classed with actions "not specifically provided for" in any of the provisions of the statute of limitations, and must therefore be commenced within two years after the cause of action has accrued.

The learned court below failed to distinguish the rule. (See Aldrich vs. McClaine, 106 Fed., 791). Having ascertained that the obligation was contractual for *some* purposes it concluded that it was contractual for *all* purposes. It relied largely upon the decision of this court in Bank vs. Hawkins, 174 U. S., 364. But the statute of limitations was not involved in that case. That action was upon an *original* subscription and the sole question was whether one banking association possessed the right to subscribe for and hold the stock of another banking association. The obligation was declared to be contractual for that purpose.

But since Bank vs. Hawkins and the case at bar were decided, this court has had occasion to consider the direct question in issue here, and has adopted the rule contended for by plaintiff in error.

See *McDonald vs. Thompson*, 184 U. S., 71.

This case plainly distinguishes the nature of this contract. First: It holds that it is not a contract *in writing*. Second: That *if* it is a contract at all it is (to use the language of the court) "a contract *created by statute* and obligatory upon the "stockholders *by reason of the statute* existing at the time of their "subscription;" and it is stated further that: "In none of the "numerous cases upon the subject in this court is this obligation "treated as an *express contract*, but as one *created by the statute* "and implied from the express contract of the stockholders to "take and pay for shares in the association,"—citing many authorities, among them being Bank vs. Hawkins, *supra*, so strongly relied upon by the court below. Third: That the action was barred because the liability was "*a liability created by statute*," regardless of the fact that it might be *contractual* for some purposes.

Howarth vs. Angle, 56 N. E., 489, and Howarth vs. Lombard, 56 N. E., 888, were also cited with approval by the learned court below to support its views against the contention of the plaintiff in error, but the issues presented in those cases related entirely to the right of a receiver of a banking association in one state to maintain an action against a subscriber to stock, residing in another state;—in other words, the only question was whether the action was a transitory one. The statute of limitations as applied to the secondary liability was not involved. This remark applies to nearly all the cases cited and relied upon by the court below.

In the case of Chapman vs. Morrell, 20 Cal., 137, the late Justice Field, then judge of the California court, in discussing the application of the statute to a contract *in writing*, used the following very pertinent language: "The statute provides that 'an " 'action founded upon any contract, obligation, or liability " 'founded upon an instrument of writing,' except in certain des- "ignated cases, shall be commenced within four years, and an "action upon a contract, obligation, or liability not thus founded, "with certain exceptions, shall be commenced within two years. "The statute by the language in question refers to contracts, ob- "ligations, or liabilities resting in, or growing out of, written "instruments, *not remotely or ultimately*, but *immediately;* that "is, to such contracts, obligations, or liabilities as arise from "instruments of writing *executed* by the parties who are sought "to be charged in favor of those who seek to enforce the con- "tracts, obligations, or liabilities. The construction would be "the same if the word 'founded' were omitted, and the statute "read 'upon any contract, obligation, or liability upon an in- " 'strument of writing.' "

The force of this reasoning applies equally to *unwritten* contracts. If the learned judge had had such a contract before him, he would doubtless have said that the three-year statute, when it speaks of contracts *not* in writing, refers to "obligations or lia- "bilities pertaining to, or growing out of *unwritten* contracts, "*not remotely or ultimately*, but *immediately.*"

Furthermore and following directly in line with the principles enunciated by Justice Field, the Supreme Court of the

State of California has, in several cases, directly distinguished the nature of the secondary liability of the stockholder in its relation to the statute of limitations. These cases are reviewed in Bliss vs. Sneath, 119 Cal., on page 530, as follows:

"A liability may be *at the same time* a statutory and a con-"tract liability—and so it has been held by this court with re-"spect to the liability of stockholders. It is a *statutory liability* "as to the *statute of limitations* (Moore vs. Boyd, 74 Cal., 167), "and a contract liability as to the right of attachment (Kennedy "vs. California Sav. Bank, 97 Cal., 93;) and as to the law defin-"ing the jurisdiction of justices of the peace. (Dennis vs. Su-"perior Court, 91 Cal., 548.)"

The Supreme Court of the State of Washington has itself passed upon statutes of a similar nature and has distinguished the nature of this liability. In the case of Wilson vs. Brook, 13 Wash., 676, it is stated that "the liability is not *on*, but *for*, the contract, debt, or agreement." In other words it is a liability against the stockholder *created by statute* for the protection of the creditors and which he voluntarily *assumes* as a *liability* and not merely as a contract obligation.

In Thompson on Corporations, Sec. 1991, the nature of this liability is thus distinguished by the learned author: "There is "some confusion among the authorities on the question whether "an action by creditors of the corporation against stockholders "is governed by the statute of limitations relating to actions upon "contracts, or by the statute relating to actions upon statutory "liabilities. The true solution of this question will, it is believed, "be found in recurring to the consideration that, at common law, "a creditor has no such right of action; since his debtor is the "corporation, which is a different legal person from that of one "of its stockholders; since the stockholder is not a partner and "since there is no privity of contract between him and the stock-"holder. * * *Without the aid of a statute*, therefore, the "creditor has no remedy directly against the stockholder. It is, "therefore, a *statutory remedy*, and is governed by the statute of "limitations applicable to such remedies, and not by the statute "applicable to actions upon contracts."

See also
Wood Stat. Lims. (3rd Ed.) Sec. 36, 39.
Robertson v. Bowline Co. 66 Fed. Rep. 63.

Mr. Justice Story, in the well considered case of Bullard vs. Bell, 1 Mason, (U. S.) 243, (see also Fed. Cases No. 2121), says that an action to enforce this liability "is certainly not a case of "express contract; and the most that can, by the utmost strain- "ing, be asserted, is, that it is a case arising *quasi ex contractu.* "It is in truth, however, a mere *legal liability, created by statute,* "which *may* furnish the *foundation* or *consideration* of a contract "express or implied; *but it is not of itself a contract.*"

Statutes of limitations affect the *remedy* only and do not enter into the *contractual* rights or obligations of the parties. They are statutes of repose and courts will look to their express *letter* to ascertain the intent of the legislature. If the legislature had intended to include "statutory liabilities" in the provision relating to contracts, it is imperative that it should have specifically so stated. Statutes of limitations are not extended by construction. Such statutes are in derogation of the common law and are to be strictly construed. Statutes in derogation of the common law are not presumed to make any alteration in the common law further than the *clear import of the language necessarily requires.*

Shaw vs. N. P. R. R. Co., 101 U. S., 557.

Johnson vs. Southern Pacific, 117 Fed., 462.

In concluding our argument upon this error we have to say that in no case which we have been able to discover has it been held that this liability is contractual for the purposes *of the statute of limitations.* All those cases, where a subscription to stock has been considered as a contractual liability, have arisen upon an effort to enforce an *original* subscription, or with reference to whether the action was of a *transitory* nature, or concerning the right of one banking corporation to hold and become liable for the stock of another banking corporation, etc.

SECOND ASSIGNMENT OF ERROR.

DOES THE COMPLAINT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION?

The contentions of the plaintiff in error upon this head are two-fold.

1. He contends that it was beyond the power of the *deputy* and *acting comptroller* to levy an assessment.

2. That the complaint does not state what the total capital stock of the association was at the time when the assessment was levied.

POWERS OF DEPUTY COMPTROLLER.

The first contention will embrace a consideration of assignment of error No. IV, namely, that the Circuit Court should have rejected exhibit "B," offered by defendant in error, whereby it was sought to prove that the assessment had been levied as required by law. (See Transcript, pp. 28-30.) It is necessary only to state that by statute the *comptroller* of the currency is the only authority having the power to determine the fact of insolvency of a national banking institution for any purpose whatever, and to decide when a resort must be had against the liability of the stockholders.

See U. S. R. S., 5234.

The *deputy* comptroller of the currency is an officer provided for by law, but we do not find that his duties are specially prescribed elsewhere than in the appropriation act of March 3, 1875. By that act the office of chief clerk of the various bureaus in the Treasury Department was abolished and it was also provided "that the duties *heretofore prescribed* by law and performed by the *chief clerks* in the several bureaus named, shall hereafter devolve upon and be performed by the several *deputy comptrollers*," etc.

See Supp. U. S. R. S. Vol. 1, p. 76.

The duties of the deputy comptroller do not seem to have been previously prescribed; but whatever they may have been it must be held that his duties were thereafter limited to those formerly belonging to the chief clerks. There is no saving clause in the statute, namely, that "such duties shall be *in addition* to those now required of him by law."

Since, therefore, it was never any part of the duties or powers of the chief clerk to determine the insolvency of a national

bank, nor to levy an assessment against its stockholders, the deputy comptroller was not authorized to act in the manner in which the complaint states and the proof shows that he did act.

See exhibit "B," Transcript, pp. 28-29.

The exhibit shows (and the deputy and acting comptroller certifies), "that whereas it appears to *my* satisfaction that in "order to pay the debts of such association it is necessary to en- "force the individual liability of the stockholders * * there- "fore by virtue of the authority vested in *me* by law *I* do hereby "make an assessment," etc.

It was incompetent for the deputy and acting comptroller to announce that by virtue of any authority vested in him by law, an assessment could be levied.

Since all of the subsequent proceedings were based upon this act, they must fall.

THE TOTAL CAPITAL STOCK OF THE INSOLVENT BANK DOES NOT APPEAR.

The second contention under this head, that it does not appear in the complaint what the total capital stock of the association was at the time of the alleged assessment must also, if correct, be determinative of this action. All of the allegations of this complaint concerning this point are found in paragraph III on page 2 of the Transcript. It is there stated that an assessment and requisition has been made upon the shareholders "for fifty "thousand ($50,000) dollars, the said sum to be paid by them "ratably on or before the 17th day of September, 1896, and the "said deputy and acting comptroller of the currency of the Unit- "ed States made a demand on each and every one of the said "shareholders for one hundred ($100) dollars upon each and "every share of the capital stock of said association held and "owned by them respectively at the time of the failure and sus- "pension of the said bank as aforesaid."

It will be seen that it is nowhere stated nor could it be reasonably inferred from any of the language used, what the total amount of the capital stock may have been. The total assessment could have been $50,000 to be paid ratably and the total

capital stock might have been $1,000,000, for aught that appears to the contrary; nor is the allegation made clearer by the subsequent statement that one hundred ($100) dollars has been demanded from each and every share held by each shareholder.

And here we must advert to what appears to have been a very glaring oversight by the learned court below. It is stated in the opinion that—"while it does not in direct terms state the "total amount of the capital stock, it sets forth facts from which "it may be inferred. It alleges that the total assessment upon the "shareholders was $50,000; that it was made ratably; that the "assessment *was* $100 *upon each share;* that *there were* 500 "*shares* and that their par value was $100 each. From these "averments it is plain that the capital stock was $50,000." Were all the averments stated by the learned court below to be found in the complaint we should certainly concede that our objection was not well taken—indeed we should say that it was frivolous. But we are totally unable to ascertain where the allegation appears in the complaint "that the assessment *was* $100 *upon each share;* "that there were *five hundred shares*, and that the par value "was $100 each." Certainly no such allegations can be found in the complaint. It is not enough to *allege* that an assessment is made "ratably"—that is a mere conclusion of law. The facts should be stated in full from which it will conclusively appear that it *is* a ratable assessment. This fact can only be determined by first ascertaining what is the total amount of the capital stock, then determining what is the total amount of the deficit, and then considering the proportion which the stockholder is liable for. Fortunately, this contention has been well sustained by this court in United States vs. Knox, 102 U. S., 422, from which we quote as follows:

"In the process to be pursued to fix the amount of the sepa- "rate liability of each of the shareholders, it is necessary to as- "certain, (1) the *whole amount* of the par value of *all* the stock "held by *all* the shareholders; (2) the amount of the deficit to "be paid after exhausting all the assets of the bank; (3) then "to apply the rule that each shareholder shall contribute such "sum as will bear the same proportion to the whole amount of the "deficit as his stock bears to the whole amount of the capital

"stock of the bank at its par value. There is a limitation of this "liability. It cannot in the aggregate exceed the entire amount "of the par value of all the stock."

This authority shows conclusively that the averments of the complaint are not sufficient upon which to found the action. The whole amount of the par value of the capital stock held by *all* the stockholders is not ascertained from the complaint; and therefore it follows that it is not possible to ascertain what is the *ratable* proportion of each shareholder. The statute itself fixes the liability as a *ratable* one only, and it is of the first consideration to ascertain the *facts*, for the purpose of determining the share of plaintiff's liability, if he has any.

THE THIRD ASSIGNMENT OF ERRORS.

THE RIGHT OF THE DEFENDANT TO RECOVER DAMAGES AGAINST THE RECEIVER, AS A COUNTERCLAIM.

If the view of this court should be adverse to the contention of the plaintiff concerning the previous assignments of error, he then urges as error that the counterclaim whereby he sought to recover damages against the receiver, was stricken out on motion of the defendant. It is difficult to conceive upon what ground such a rule can be upheld unless it is that whatever wrongful acts were committed by the receiver were of a personal nature and not such as the receivership could be made responsible for. If this be the proper conclusion, (and we are not now contending that it is not) then it must follow that the property, which was conveyed to the receiver and by him turned into the trust, must be returned to the defendant. It is beyond question (the correspondence conclusively shows this) that the conveyance was made to the *receiver in trust* until he could secure the ratification of the proposed contract of compromise between the parties. It is also beyond question that the proposition was never carried out by the receiver and that he violated the terms thereof in the taking of the judgment. This question, as we have already said, is *res adjudicata*, having been decided *on the merits* in favor of the contention of the plaintiff in error, as shown by the record in the first action.

Certainly one of two conclusions must necessarily follow from the admitted facts: Either the receiver was bound to return the property upon his failure to carry out the terms of the agreement or he is now bound to allow to the defendant the true and fair value of the premises which have been absorbed by the trust, as an offset or counterclaim to any judgment which he may be entitled to recover.

And here we must advert to the opinion of the learned court below wherein this question was argued. It is there stated that because the lots were turned over at an *agreed* price, the plaintiff in error cannot complain that he has not received credit for the full value thereof; and it is further stated that he failed to carry out the agreement relative to the payments and therefore cannot complain of the subsequent conduct of the receiver. If this contention of the learned court below were sustained by the record undoubtedly it would be unanswerable. But the learned judge who wrote the opinion evidently overlooked the fact that the negotiations between the parties never passed beyond the stage of *proposals* and counter-proposals; that in fact there was no *agreement* between them. The plaintiff performed his part of the proposal by executing the conveyance of the property and placing it in the hands of the receiver as trustee for the purposes of having the proposal confirmed and concluded as an *agreement.*

It must not be forgotten in considering this question (and the plaintiff is bound to have had knowledge of that rule of law) that a receiver of a national banking association has no power whatsoever to enter into a binding *agreement* concerning matters affecting his trust *without the authority of the comptroller.* It is, however, necessary to deal with him in the first instance. He is the only intermediary. Hence a certain amount of trust and confidence must necessarily be reposed in him. In the case at bar he expressly stated that he would hold the deed until the proposal had become final and conclusive and that if there should be any failure in this respect he would return the same unrecorded.

How then can it be said that the plaintiff in error has failed to comply with the terms of his agreement?

Undoubtedly it was because of the fact that no agreement

had been entered into between the parties in this case that the second action resulted adversely to the defendant in error and that he asked for and was given a voluntarily non-suit at the close of the trial.

While it is true that the lots were turned over at an *agreed price*, it is also true, that they were turned over upon an *agreed condition*, which was never carried out by the receiver. The receiver in several of his letters urges the plaintiff to *make good* the *proposition* by a cash payment and states that it will "undoubtedly have great weight with the comptroller in determining whether to accept the proposition." (See letter of April 22, Transcript, p. 41). In another letter he says that if plaintiff in error will make him a cash payment the money will "not be applied on the settlement until it is sanctioned by the comptroller" and if not sanctioned "to be subject to the order" of the plaintiff in error. (See letter of October 4, 1897, Transcript, p. 44).

Such representations certainly make the defendant in error a *trustee* for the plaintiff. He had no right to receive the money upon a representation that he would return it if the proposal was not ratified by the comptroller, and, at his convenience, long afterwards, apply it upon the assessment.

When offsets have been denied to a stockholder it has been where he was claiming an allowance on account of a *deposit* or of some *indebtedness* owing him by the bank *previous to its insolvency*. This is upon the theory that the *additional* liability is for the benefit of the depositors. In the case at bar the depositors have received the benefit of the full value of the lots conveyed; the lots should be construed *as so much cash*, at their fair value paid by the plaintiff in error and *applied* by the receiver for the benefit of the depositors. To hold otherwise would be to say that the plaintiff in error should pay more than a *ratable share* of the debts and liabilities of the trust.

That error was committed by the court in striking out this defense is apparent from the subsequent proceedings in the case. It attempted, upon the entering of the findings of fact and conclusions of law, to make a correction of the original error upon the demurrer to the complaint, by the offer to make a credit to

plaintiff in error of $200 "on account of the transfer of lots 3 "and 4, block 27, Corrected Plat of South Bend, *if he would* "*accept the same*, but as he declines to say whether he will accept "the same or not the court concludes that it has no right to allow "said credit of its own motion and without the assent of the "defendant." Upon what theory was the court powerless to make this credit without the assent of the defendant? Undoubtedly, because of the fact that, to do so was outside the issues of the case as they then stood, the court having stricken out, on motion of the defendant in error, that portion of the answer which would have made this a proper issue in the case.

For the defendant to have *consented* to a credit of an amount which he had neither asked nor desired, and which was not within the issues before the court, and was entirely inadequate, would have constituted an undoubted waiver of his rights to prosecute this cause further with any hope of success.

FIFTH ASSIGNMENT OF ERROR.

THE COURT SHOULD HAVE SUSTAINED THE MOTION FOR NON-SUIT AT THE CLOSE OF THE TRIAL.

The fifth assignment, really includes all the other questions in the case.

The first question is, whether the dismissal of the first action created a bar to the maintainance of another action upon the *assessment?*

The second question is, whether the receiver had obtained the requisite authority of the comptroller of the currency and a court of competent jurisdiction, to maintain this action?

THE BAR OF THE FIRST ACTION.

First, it seems to us from the admitted facts of this case that the order of the court in the first action dismissing the same and striking out the words "without prejudice" (which were inserted without the knowledge of the plaintiff in error and afterwards stricken out at his instigation, and by *the consent* of the

defendant in error), constitute an *agreed dismissal* and present a conclusive bar to the maintainance of another action by the same parties for the same cause. No contention is made that an ordinary dismissal, without a trial upon the merits, and without any agreement between the parties, can create a bar. The Washington statute regulates this question by providing that *in such cases*, the dismissal will not work a bar. But such is not the case here. What better evidence could there be of a dismissal *by agreement* than that presented in this case? The receiver accepted the deed upon the very condition that he would dismiss the action. That he failed to do so *voluntarily* does not militate against our contention that he was *bound* to do so; and that the dismissal was *enforced* by order of the court after a trial upon the merits, (in which the very question of his duty to do so was the question at issue) is all the more conclusive of a final adjudication of the controversy concerning the *assessment*.

As before stated, such was undoubtedly the view of the receiver at the time, else why was an action immediately begun upon the alleged *contract?* And when we remember that the order itself was changed, at the request of the plaintiff in error and by the consent of the defendant, and the very words which are recognized everywhere as being inserted for the purpose of avoiding a bar to another action, were stricken out, can it be contended for a moment that it was not the intention and understanding of all the parties, including the court, that the dismissal was an *agreed* one and was to constitute a final settlement of the controversy concerning the *assessment?* That the receiver failed to dismiss voluntarily, can only affect the right of the defendant to recover damages.

It is competent for parties in a pending action to compromise and settle the same and cause it to be dismissed for the purpose of creating a bar to further proceedings. To hold otherwise would be to say that it is not competent for the parties to contract with reference to litigation. In Merritt vs. Campbell, 47 Cal., 542, it was said that "a judgment of dismissal, when "passed upon and entered in pursuance of an *agreement of the "parties*, must be understood, in the absence of anything to the "contrary expressed in the agreement and contained in the

"judgment itself, to amount to such an adjustment of the merits "of the controversy, by the parties concerned, as will constitute "a defense to another action afterwards brought upon the same "cause of action."

Upon no theory, except an agreed dismissal, is it possible to comprehend the position taken by the receiver,—and which he continues to take,—that he is entitled to withhold the *consideration* given by the plaintiff in order to obtain the dismissal, namely, the title to the lots.

Herman on Estoppel says: "A judgment of dismissal ren- "dered on the application of either party, with the consent of "the other, amounts to an open and voluntary renunciation of "the plaintiff's suit which is a bar to another suit subsequently "brought upon the same cause of action." And again he says: "If the complainant desires to reserve the right of a future "action, the dismissal must be 'without prejudice,' or the pre- "sumption should be that it is on the merits. It is trifling with "justice to allow a party to bring as many actions as he may "see fit to, simply because he pays the costs." See

Herman Estoppel, p. 297.
Nashville, etc., vs. United States, 113 U. S., 261.
Lyon vs. Perrin, etc., 125 U. S., 698.
Bartlett vs. Sheehorn, 25 Wash., 261.
Crossman vs. Davis, 79 Cal., 603.
Newark vs. Newark, 22 Mich., 292.
Durant vs. Essex, 7 Wall., 107.
Gove vs. Lyford, 44 N. H., 525.
Kelsey vs. Murphy, 25 Pa. St., 78.
Thurston vs. Thurston, 99 Mass., 39.
Garner vs. Second National Bank, 89 Fed., 636.
Jarboe vs. Smith, 52 Am. Dec., 541.
Bigelow vs. Winsor, 1 Gray (Mass.), 299.
2 *Black Judgments*, Sec. 706.

In Jarboe vs. Smith, supra, it was said: "A new cause of "action may arise upon the agreement of the parties, that pro- "duced the order dismissing the suit; and there might possibly "be cases where, by the terms of the agreement, a suit could be

"maintained upon the original cause of action, but it would be "alone by virtue of the stipulations contained in the agreement "of the parties."

In the case at bar, however, the agreement was for an absolute dismissal, the consideration thereof (to-wit, the lots), was paid for by the plaintiff in error and received by the defendant in error. It seems to us that it is impossible to make a plainer case of a bar than this one.

It may be argued, in order to avoid the effect of the former dismissal, that it was not a trial upon the merits. The record, however, will conclusively settle this question in favor of the contention of plaintiff in error.

By reference to p. 36 of the transcript (Par. V.) ,it will be seen that plaintiff in error set up in his answer in the second cause of action that the dismissal was upon the merits, and the defendant in error in his reply *admitted* this allegation to be true.

"That said default and judgment was taken without any "notice to this defendant; * * * and said court on the 21st "day of February, 1898, after hearing the evidence produced "by both parties *upon the merits* of said application and the "argument of counsel thereon, and being fully advised, did find "that the entering of said judgment was *contrary to agreement* "and in *violation thereof*, and did order said judgment vacated "and set aside and declared of no effect and void."

On p. 39, (Par. V.), of the reply the defendant in error states:

"He *admits* the allegations contained in paragraph five, ex-"cept the allegation that said default and judgment were taken "without any notice to the said defendant."

Thus the receiver admits that his acts were contrary to and in *violation* of the agreement.

It will doubtless be argued that under the laws of the State of Washington it is prescribed that a judgment of dismissal or non-suit does not serve as a bar. Such was the view of the learned court below, and we concede such to be the law, upon an

ordinary dismissal. But it has been held by the Supreme Court of Washington that this statute does not apply to an action which is dismissed after a trial *upon the merits.*

See *Bartlett vs. Sechorn*, 25 Wash., 261.

WANT OF AUTHORITY, ON THE PART OF THE RECEIVER, TO SUE.

One of the reasons why the non-suit asked for by the plaintiff in error should have been granted, is the fact that the receiver never obtained the previous authority of the comptroller of the currency to institute this action. In addition to the grounds stated in the argument of the Second Assignment of Error, concerning the want of authority on the part of the Deputy Comptroller to levy the assessment, we desire now to urge, that the receiver was acting contrary to the *direct and positive orders of the Comptroller and the Court*, and was wholly without authority to sue.

It is plainly settled by the authorities that a receiver of a national banking association has no power to bring an action, to enforce the personal liability of a stockholder without the direct, positive, and *previously* obtained authority of the Comptroller; and that this authority must be specifically averred in the complaint and proved when put in issue. The statute upon this subject is so plain that it would seem not to require any adjudication, but fortunately for the plaintiff in error, it has received ample consideration at the hands of this court. That portion of section 5234, U. S. R. S., which is applicable to this question reads as follows: "Such receiver, *under the direction of the* "*Comptroller*, shall take possession of the books, records, and "assets of every description of such association, collect all debts, "dues and claims belonging to it, and upon the *order of a court* "*of record* of competent jurisdiction may sell or compound all "bad or doubtful debts and on *a like order*, may sell all the real "and personal property of such association, on such terms as the "court shall direct, and may, if necessary to pay the debts of "such association, enforce the individual liability of the stock-"holders."

That the receiver is without power to "enforce the indi-"vidual liability of the stockholders," without the *previous* authority of the Comptroller, has been settled by this court in the case of Kennedy vs. Gibson, 8 Wall., 506. The language of the court is forceable and unambiguous. It is there stated:

"The receiver is the instrument of the Comptroller. * * "* * It is for the Comptroller to decide when it is necessary "to institute proceedings against the stockholders to enforce "their personal liability, and whether the whole or a part, and "if only a part, how much, shall be collected. These questions "are referred to his judgment and discretion. * * * The "stockholders cannot controvert it. He may make it at such "time as he may deem proper, and upon such data as shall be "satisfactory to him. *This action on his part is indispensable* "whenever the personal liability of the stockholders is sought "to be enforced, and must *precede* the institution of suit by the "receiver. The fact must be *distinctly averred* in all such cases, "and if put in issue *must be proved.*"

Mr. High, in his work on Receivers, takes the same view and distinguishes between the *general* power of a receiver of a National Bank to institute actions, without the specific authority of the Comptroller, to enforce demands due the bank. In such case, he says, it is not necessary that he should first obtain the consent of the Comptroller, "the case being clearly distinguish-"able from that of an action against shareholders, to enforce "their personal liability."

High Receivers, Sec. 360 (1st Ed.)

By reference to the documents offered by the plaintiff in error and rejected by the court (Trans., pp. 47-50), it will appear that the receiver on the 30th day of September, 1897, (which was long previous to the institution of this action), petitioned the judge of the Circuit Court of the United States for the District of Washington, for authority to close up the affairs of his trust, and to dispose of the remaining assets in his hands. The petition recites that the assets remaining in his hands consist of various properties, including "claims due upon the *assessment of* "*the capital stock* of said bank;" and that the petitioner has,

"after exhausting all means of collection, been unable to realize "upon said assets, which your petitioner is informed and be- "lieves are bad and doubtful assets." He then states that he can realize a considerable sum by compromising and compounding the same, or selling them at public or private sale. Among the properties listed by him are "lots three (3) and four (4), block "twenty-seven (27), Corrected Plat of South Bend," the property received by him from the plaintiff in error on account of the first proposal of compromise. Perhaps the most important recital of said petition is the following, which shows conclusively that this receiver, instead of acting under the direction of the comptroller, when he instituted this proceeding, acted directly in opposition thereto. He says:

"Your petitioner further represents that an examination of "the condition of the affairs of said receivership has been made "by a special national bank examiner, *under the authority and "direction of Hon. James H. Eckels, Comptroller of the Cur- "rency*, and that *all the remaining* assets of said trust are bad "and doubtful, and it is *the desire of the said Comptroller of the "Currency* that said receivership be closed at an early date, and "that *said Comptroller has directed and authorized* your peti- "tioner to apply to this Honorable Court for an order author- "izing and empowering your petitioner, as such receiver, to "*compromise and compound*, or SELL at private sale, all of the "assets of said trust, and to SELL at public sale all of the re- "maining assets thereof (except such as may be compounded or "sold at private sale), for cash, after duly advertising the sale "at public auction pursuant to law."

See Transcript, p. 48.

The prayer of the petitioner is that the court issue an order directing him to compound, or SELL, all of said assets.

The order of the court, based on this petition, recites that, "being fully advised in the premises, the court doth hereby or- "der, adjudge, and decree that said Joseph G. Heim as receiver "aforesaid, be and he is hereby authorized to *compromise* and "*compound*, or SELL, at private sale all of the assets of said "bank, consisting of bills receivable, judgments, overdrafts, stock

"and securities, *claims due upon assessment of the capital stock* "of said bank," etc. (See Trans., p. 49). He is also authorized to sell the lots three (3) and four(4), block twenty-seven (27), Corrected Plat of South Bend.

Here was a specific direction made by both the comptroller and the court TO SELL (in case he could not compound) "all claims due upon assessment to the capital stock." That this order was a wise one is shown by the expense and delay which has followed its disobedience. Nearly seven years have elapsed and the trust is not yet closed; three actions have been brought which have involved the trust in heavy expense for costs and attorney's fees, a large part of which it will never be reimbursed, even if it should succeed in the present action.

Subsequently, on the 6th day of October, 1897, the receiver reported to the court that he had held a sale of the assets, under the former order of the court, setting out in detail the various properties disposed of and the amounts received therefor, and upon said report an order was entered confirming the sale.

This order was entered on the 6th day of October, 1897,—nearly two years before the beginning of this action. It was never modified in any manner; and the receiver was never afterwards in any manner authorized by the comptroller of the currency, or by any court of competent jurisdiction, to institute this action. It is not even alleged in the complaint that he was so authorized. This being so, there is but one conclusion to draw, and that is, that the receiver, in instituting this action, not only acted without the authority of the comptroller, or of a court of competent jurisdiction, but acted in direct defiance of said order. His petition to sell the remaining assets shows that the comptroller had investigated the whole matter and had found it desirable to close up the trust, and as a result of those investigations, had directed him to sell the assets, including this claim.

Suppose the receiver had, acting upon the recommendation of the comptroller, obtained a *special* order directing him to compound, or sell, the particular assessment against plaintiff in error, and in entire disregard of the instructions of the court, had afterwards instituted this action. Would it be contended, in that event, that he could maintain this action? Certainly not. And

yet there is no difference in principle between such an order and the one entered by the court directing him to compound or sell all the "claims due upon assessment of the capital stock," of which this assessment is one.

It may be urged that the want of authority on the part of the receiver to institute this proceeding, has been supplied by the comptroller, since the action was begun, by reason of the fact that he has not ordered it discontinued. It is a sufficient answer to this to say, that even if this were true, it does not come within the rule laid down by this court in Kennedy vs. Gibson, *supra*, where it stated that the authority of the comptroller must *precede* the institution of the action; and must be distinctly averred and proved.

Furthermore, it must not be forgotten that this action was instituted within three years lacking but two days, and if the comptroller has since conferred the authority it is important to know just when it was conferred—whether before or after the right of action was concededly barred.

ELECTION OF REMEDIES.

As an additional ground why the court should have granted the motion of plaintiff in error for a non-suit, we urge that the receiver made an election of remedies and that it is not competent for him after having instituted a proceeding to recover upon the alleged *contract of compromise*, to bring another action against the plaintiff in error upon the *assessment*. In other words the receiver, having elected to consider the assessment as merged in a contract of compromise, and having failed in his effort to enforce the alleged contract, can he now be heard to say that the assessment still exists?

It is a well settled rule of law that when a person elects to proceed according to one theory of fact for the protection and enforcement of his rights, as he deems them to be, he cannot afterwards abandon his position and proceed according to another theory which is inconsistent with the former theory. He cannot thus blow hot and cold.

To state the rule in the language of these authorities as summed up in 7 Ency. Pl. and Pr., p. 364: "It is certainly the "established law in every state that has spoken on this subject, "that the definite adoption of one of two or more inconsistent "remedies by a party cognizant of the material facts, is a con- "clusive and irrevocable bar to his resorting to the alternative "remedy." See also

Pine Lake, etc., vs. Layfayette, etc., 53 Fed. Rep., 853.
Robb vs. Vos, 155 U. S., 13.
Johnson vs. Missouri Pac., etc., 52 Mo. App., 407.
Dyckman vs. Sevatson, 39 N. W. (Minn.), 73.
White vs. White, 34 Atl. (Vt.), 425.

As soon as the choice is made between the alternative remedies, the election is complete and the bar is absolute.

"No suitor is allowed to invoke the aid of the courts upon "contradictory principles of redress, upon one and the same line "of facts."

Moller vs. Tuska, 87 N. Y., 166.

If the defendant in error was right in his contention that the assessment had been merged in a contract of compromise, then it follows that he cannot now possibly be right in contending that the assessment is still in force. If the identity of the obligation on the part of the plaintiff in error as established by law, had once disappeared, even for an instant, it could not again be created by any power; and it is immaterial whether the defendant in error was able to recover upon the alleged contract of compromise, or not. He has elected to assert the existence of a contract in place of the assessment, and he will not now be heard to say, even though he has failed to uphold his contention, that no such contract ever existed and that therefore the original assessment is still in force.

This question is fully discussed in

Thomas vs. Joslin, 1 Am. St. Rep., 624 and notes.
Fowler vs. Bowery, etc., 113 N. Y., 405; 10 Am. St. Rep., 479 and notes.

The theory of the assessment, and its disappearance into a contract, are absolutely inconsistent. It is impossible to imagine the existence of both at the same time. Hence, the rule which permits various actions upon concurrent remedies cannot be invoked to prevent the bar claimed by plaintiff in error; nor does it come within the rule applicable to a mistaken remedy, which permits the suing party to institute another action in the proper form.

Nor does the failure of defendant in error to secure satisfaction by means of the remedy which he adopts, furnish any excuse for permitting him to resort to another.

Goss vs. Mather, 46 N. Y., 689.
Farwell vs. Myers, 59 Mich., 179.
Acer vs. Hotchkiss, 97 N. Y., 395.
Nelson vs. Carrington, 6 Am. Dec., 519.

The test of inconsistency as applied to election, in the enforcement of contractual rights, seems to be that where one action is founded upon its affirmance and the other upon its disaffirmance, the bar will be complete.

Connihan vs. Thompson, 111 Mass., 270.

As, where a party is entitled to rescind a contract for any reason (such, for instance, as fraud or lack of authority), he loses the right to rescind, if he brings an action to enforce the contract.

This is exactly the case at bar, where the defendant in error saw fit to affirm the alleged contract of compromise so far as he could do so, by accepting the property of the plaintiff in error, and retaining it to the end, and afterwards instituting an action to enforce the same. Can he now be heard to disaffirm the same contract, while still retaining the property, and proceed to enforce the original obligation out of which the alleged contract arose?

We do not see how it is possible for the defendant in error to avoid one or the other of the horns of this dilemma. He must either affirm or disaffirm the contract, as embodied in the proposal of the plaintiff in error to compromise the assessment; and

if he disaffirms it he must return to the plaintiff in error the property received by him under the proposal and rely solely upon his right to enforce the original assessment.

THE SEVENTH ASSIGNMENT OF ERROR.

This assignment relates to the error of the court in entering the findings and conclusions presented by the defendant in error.

It is unnecessary to add anything to what has been already stated, to show that this was error on the part of the court, except to call attention to the fact that no allowance was made to the plaintiff for anything whatever on account of *the lots* conveyed to the receiver. What seems to us a remarkable statement is that already several times adverted to and found in the conclusion of law, that the plaintiff in error is entitled to "a credit of "$200 of date of April 29th, 1897, on account of the transfer of "lots three (3) and four (4), block twenty-seven (27), Corrected "Plat of South Bend, *if he would accept the same*, but as he de-"clines to say whether he will accept the same or not, the court "concludes that it has no right of its own motion and *without the* "*assent* of the defendant."

If the court had no right to make the credit, then it had no right to make the assent of the plaintiff a condition for its allowance. Why should plaintiff upon any ground of law or justice, accept a paltry $200 in consideration of property which the evidence shows was worth six times that amount? And why should it be thought fair or equitable for him to do so when the receiver received the conveyance in pursuance of an agreement which he himself "violated," *according to his own admission*. (See Pr. V. of plaintiff's answer and defendant's reply, Transcript, pp. 36 and 39).

THE EIGHTH ASSIGNMENT OF ERROR.

That the court erred in entering judgment against the plaintiff in error, follows from what has already been said.

Respectfully submitted,

T. O. ABBOTT,
Attorney for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 58.

ADOLPHUS F. McCLAINE, PLAINTIFF IN ERROR,

vs.

GEORGE C. RANKIN, AS RECEIVER OF THE FIRST NATIONAL BANK OF SOUTH BEND, WASHINGTON, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR (BY LEAVE OF COURT).

T. O. ABBOTT,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 13667

(18,972.)

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SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

Additional Argument, by Leave of Court, in Support of the First Assignment of Error, viz., that This Action is Barred by the Statute of Limitations.

In answer to the argument of defendant in error that the words "or liability," in subdivision 3 of section 4800 of Ballinger's Code of Washington, includes a "*statutory* liability," we ask the court to consider the provisions of the limitations

act of Washington as embodied in the *entire* section, together with section 4798, relating to *written* contracts "or liabilities."

Section 4798 reads as follows:

"Within six years: 1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

"2. An action upon a contract *in writing*, or liability express or implied *arising out of a written agreement.*

"3. An action for the rents and profits or for the use and occupation of real estate."

Section 4800 *entire* reads as follows:

"Within three years: 1. An action for waste or trespass upon real property;

"2. An action for taking, detaining or injuring personal property including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

"3. An action upon a contract or liability, express or implied, *which is not in writing*, and *does not arise out of any written agreement;*

"4. An action for relief upon the ground of fraud, the cause of action in such case, not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

"5. An action against a coroner, or constable, upon a *liability* incurred by the doing an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution; but this subdivision shall not apply to an action for an escape;

"6. An action *upon a statute* for a penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the State, except when the statute imposing it prescribed a different limitation;

"7. An action for seduction."

It will be seen from a comparison of the foregoing sections that, so far as subdivision 2 of section 4798 and subdivision 3 of section 4800 are concerned, the one is the antithesis of

the other. One relates to contracts or liabilities growing out of contracts *in writing*, and the other relates to contracts or liabilities growing out of contracts not in writing. If this were not the intention of the legislature, then why was it necessary to specify so many other kinds of "liabilities"? In these two subdivisions the word "liability" is associated with the words "contract," "express," "implied," and "written agreement." Obviously, therefore, the meaning is restricted so that it stands only for a liability founded upon a simple contract, or arising out of the breach of a simple contract. Unless this is so, all actions to recover money, as damages or penalties, are comprehended in this subdivision, and yet it is plain that the legislature did not so intend, for the same section contains six other subdivisions, each specifying a different kind of action to enforce a liability, which must be commenced within the same period of three years.

In support of this view and in addition to the authorities already cited, we cite:

Hawkins *vs.* Furnace Co., 40 Ohio State, 507.

Other authorities are not accessible owing to the absence of former briefs which cannot be obtained for some days. Taken in connection with the remarks of Wood (Statute of Limitations, secs. 36 and 39), it would seem that the conclusion is irresistible that the liability of the plaintiff in error is barred because it is a "liability not otherwise provided for" in the statutes of Washington.

Mr. Wood says that "statutory" liabilities are "not within the statutes adopted in the several States applicable to simple contracts, *unless expressly made so.*" Hence the term "liability" as used in this statute does not relate to a *statutory* liability.

The opinion of the circuit court of appeals, holding adversely to the contention of plaintiff in error, is found at 106 Fed. Rep., p. 791, and reads as follows, to wit:

MORROW, circuit judge (after stating the facts):

"It appears that this suit was commenced more than two and less than three years after the date when the assessment levied by the comptroller became due. The insolvent corporation and the defendant being citizens of the State of Washington, the laws of that State as to limitation of actions apply. The plaintiff in error contends that the case is governed by subdivision 3 of section 4800 of Ballinger's Annotated Codes and Statutes of Washington, which provides that 'an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument,' may be commenced within three years after the cause of action shall have accrued. The court below rules that the liability sued upon, namely, that of a stockholder in a national bank, was not contractual, but statutory only, and therefore the suit did not come within the provisions of section 4800, but was governed by section 4805 of the same Code, providing that 'an action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued.' The case thus turns upon the question whether or not the liability of a stockholder in a national bank can be regarded as contractual. Section 5139 of the Revised Statutes (national banking act) provides that shares of stock in a national bank shall 'be deemed personal property and transferable on the books of the association in such manner as may be prescribed by the by-laws or articles of association;' and 'every person becoming a shareholder of such transfer shall in proportion to his shares succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired.' By section 5151 it is provided that 'the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts and debts of such association, to the extent of the par value of their stock therein in addition to the amount invested in such shares.' Here is a statutory liability, but it is a liability involving all the elements of a contract. The shareholder of such an association has performed a voluntary act in becoming an owner of stock in the

association, and this voluntary act has of itself and by force of its contractual character called into existence specific obligations whose nature and extent are determined by the law. When a national banking association is formed, it is in compliance with the terms of the statute, and its stock is obtainable on definitely stated terms. There is nothing compulsory in the transaction. The act of acquiring ownership is purely voluntary. The statute merely attaches conditions to the ownership of the stock. The purchaser of the stock accepts these conditions, and the acts are then completed which give the obligation existence in a contractual form. This question was before the Supreme Court of the United States in Carrol *v.* Green, 92 U. S., 509, 513, 23 L. Ed. 738. The defense to the action was the claim that it was barred by the statute of limitations. It was held that the remedy was an action upon the case, founded upon a contract, and as such was barred by the statute of limitations. The court, in arriving at this conclusion, said :

> "'The legislature created the corporation and prescribed certain terms to which the stockholders should be subjected. This was an offer on the part of the State. It could be accepted or declined. There was no constraint. By taking the stock, the terms were acceded to, the contract became complete, and the stockholders were bound accordingly. The same result followed which would have ensued under the like circumstances between individuals. The assent thus given and the promise implied are of the essence of the liability sought to be enforced in this proceeding. If a remedy at law were necessary, clearly it must have been in case.'

"In Metropolitan R. Co. *v.* District of Columbia, 132 U. S., 1, 13; 10 Sup. Ct., 19, 33 L. Ed., 231, the action was brought by the District of Columbia, a municipal corporation, to recover from a street railroad company the cost of maintaining pavements in a street, which the company was, by its charter, bound to maintain. The charter was granted by an act of Congress. One of the defenses interposed to the action was the statute of limitations. This defense was overruled by the lower court on the ground that the action was founded on a statute, and that the statute of limitations did not apply

to actions founded on statutes or other records or specialties, but only to such as are founded on simple contract or tort. The Supreme Court held that the lower court was in error in supposing that the action was founded on the statute. 'It was,' the court said, 'an action on the case upon an implied assumpsit arising out of the defendant's breach of a duty imposed by statute and the required performance of that duty by the plaintiff in consequence. This raised an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys expended in that behalf. The action is founded on this implied obligation, and not on the statute, and is really an action of assumpsit. The fact that the duty which the defendant failed to perform was a statutory one does not make the action one upon the statute. The action is clearly one of those described in the statute of limitations.' The cases cited in support of this doctrine are Carrol *v.* Green, *supra;* Beatty's Adm'r *v.* Burnes' Adm'rs, 8 Cranch, 98, 3 L. Ed., 500; McCluny *v.* Silliman, 3 Pet., 270, 7 L. Ed., 676.

"In Richmond *v.* Irons, 121 U. S., 27, 55; 7 Sup. Ct., 788, 30 L. Ed., 864, the question was whether the personal liability of a stockholder in a national bank for the debts of the corporation survived against his personal representatives. The court, in distinguishing the provisions of the national banking act from the language of the statutes of Massachusetts, points out that under the former the liability of a stockholder in the bank arises upon a contract. The court says:

> "'Under that act (the national banking act) the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder.'

"And in the case of Bank *v.* Hawkins, 174 U.S., 364, 372; 19 Sup. Ct., 739, 742; L. Ed., 1007, 1011, in speaking of the contention that the liability of the stockholder in a national bank to respond to an assessment in case of insolvency is not contractual, but statutory, the court said:

> "'Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory; but, as the ownership of the stock in most cases arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.'

"In the case of Howarth *v.* Lombard (Mass.), 56 N. E., 888, the supreme court of Massachusetts declares this doctrine to be correct, holding that there is a contractual element entering into the liability of a bank stockholder, although the liability is founded on a statute. 'The undertaking,' the court says, 'is as if one subscribing for stock expressly agreed to take and hold it under a previously prepared contract in writing that all who should become holders of the stock should pay the amount of their subscriptions to the corporation when needed, and should pay the additional sum to create a fund for creditors if the corporation should become insolvent, and a receiver should be appointed to collect it.' In a similar case the court of appeals of New York held the liability of a bank stockholder to be a contractual obligation, growing out of an implied assent to the statutory conditions on which the banking association was organized. Howarth *v.* Angle (N. Y. App.), 56 N. E., 489. See, also, Witters *v.* Sowles (C. C.), 38 Fed., 703, and Hutchings *v.* Lampson (C. C.), 82 Fed., 961. It follows, then, that the liability of the defendant in error as a stockholder of a national bank must be held to be not only statutory, but contractual as well. The action brought by the plaintiff in error therefore comes within the limitations of subdivision 3 of section 4800, Ballinger's Ann. Codes & St. Wash. Judgment reversed, with directions to the circuit court to overrule the demurrer."

Respectfully submitted.

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